

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

75-1224

To be argued by RICHARD S. STOLKER

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

MICHAEL CHIARIZIO, Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEE

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No. 75-1224

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v.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE

QUESTIONS PRESENTED

1. Whether the district court's refusal to suppress evidence obtained by electronic wire interceptions was proper.
2. Whether the district court's refusal to dismiss the indictment on grounds of abatement and pardon was correct.
3. Whether the district court erred in refusing to excuse the panel of jurors because of an allegedly prejudicial statement by a venireman.
4. Whether the government's proof properly established the chain of custody of voice exemplars, tape recordings, and related materials.

5. Whether the court erred in permitting the jury to examine transcripts of tape recordings in evidence.

6. Whether the court properly allowed a government witness to read to the jury from transcripts of defendants' telephone conversations.

7. Whether there was error in the jury's viewing of certain filing cards attached to the transcripts of telephone conversations.

8. Whether the district court properly allowed a witness to identify appellant's voice on the basis of recorded voice exemplars.

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, appellant and two codefendants were convicted of operating an illegal gambling business involving five or more persons and having a gross revenue of \$2000 or more on one or more days, in violation of 18 U.S.C. §§ 1955 and 2 (count 1), and conspiracy to operate such an illegal gambling business, in violation of 18 U.S.C. § 371 (count 2).^{1/} Appellant was sentenced to pay a \$5000 fine on count 1 and to concurrent two-year prison terms on each count; this sentence of imprisonment was suspended in favor of 6 months' incarceration followed by probation for a period of 3 years or final payment of the fine imposed on count 1.

^{1/} Codefendant Cecil Johnson was convicted on counts 1 and 2 and was sentenced to pay a \$3500 fine on count 1 and to concurrent two-year prison terms on each count. Codefendant Morton White was convicted on counts 1 and 2 and was sentenced to pay a \$500 fine on count 1 and to concurrent 6-month prison terms on each count. Codefendants Jay Schaefer, Emil Sapere, Benjamin Birenbaum, Philip Frascarelli, Michael Cavarra, Angelo De Sena, Peter Sheridan, David Lee Johnson, and Carl Vernale pleaded guilty to count 1; count 2 was dismissed as to each of them; and were sentenced to fines and prison terms. Execution of the prison terms was suspended in whole or in part as to all defendants in favor of probation.

1. On March 22, 1973, pursuant to an application of of Paul Coffey, Special Attorney for the United States Department of Justice, supported by the affidavit of FBI Special Agent Dewey Santacroce and the authorization of the Attorney General, the district court, pursuant to 18 U.S.C. § 2518, authorized a wire interception and installation of a pen register device on telephone number 203-247-5976, listed to Marie Rubera, 1889 Broad Street, Hartford, Connecticut, for a period of 15 days, with a progress report to be made to the court after five days. This wire interception was aimed at uncovering a gambling operation involving appellant (who resided in a building directly adjoining the residence of Rubera, his grandmother). Probable cause for the wire interception authorization was derived in part from a February 1973 wire interception authorization on the telephone of Joseph Telesca, which yielded conversations showing the existence of a gambling relationship between appellant and Telesca (S. Tr. 132, 142-143, 164).^{2/} This interception yielded numerous recorded conversations between the appellant and others which tended to prove the existence of an illegal gambling business. The interception was terminated on April 2, 1973. (S. Tr. 129-138.)

^{2/} "S. Tr." denotes the reporter's transcript of the pretrial suppression hearing; "Tr." denotes the reporter's transcript of the trial.

On May 8, 1973 the court authorized a second set of wire interceptions respecting telephone numbers 203-223-3117 (listed to Angelo De Sena) and 203-828-5713 (listed to Charles Schaefer). The interceptions, which began on May 9 and ended on May 14, 1973, yielded additional evidence of a large-scale gambling business.

2. Following a 3-day evidentiary hearing on defendants' motion to suppress the fruits of the wire interceptions and to dismiss the indictment, the court denied the defense motions (App. 21A). At trial the government, by introducing many of the recorded telephone conversations obtained as a result of the wiretap authorizations, the testimony of FBI agents participating in the investigation, and other evidence, proved the existence of an illegal gambling business being conducted in violation of Connecticut law, involving five or more persons in its conduct, management, and direction, and having a gross revenue of at least \$2000 on one or more single days, as well as the existence of a conspiracy to engage in such an illegal gambling business.

^{3/} The sufficiency of the evidence is not contested in this appeal.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN REFUSING TO SUPPRESS THE EVIDENCE OBTAINED BY ELECTRONIC WIRE INTERCEPTIONS.

A. The Government's Failure to Name Emil Sapere as an Individual Whose Communications Would Be Intercepted Did Not Invalidate the Wiretap Order.

Appellant contends that the government's failure to identify defendant Emil Sapere in its application to the district court as a person "whose communications are to be intercepted" or to disclose the existence of a November 1971 application to intercept Sapere's telephone, violated the terms of 18 U.S.C. §2518(1) and thereby rendered the wiretap authorization invalid.

1. The statute (18 U.S.C. §2518(1)(b)) requires that the applicant set forth a full and complete statement of the facts and circumstances relied upon to justify his belief that an order should be issued, including (inter alia) "the identity of the person, if known, committing the offense and whose communications are to be intercepted" (18 U.S.C. §2518(1)(b)(iv)) and "a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application" for wire interceptions involving any of the same persons, facilities, or places for which the interception order is sought (18 U.S.C. §2518(1)(e)).

The evidence adduced at the pretrial suppression hearing makes clear that Emil Sapere was not a person known⁴ to be involved with appellant in committed gambling offenses by use of the wire facility sought to be intercepted. More than a year earlier, a wire interception of Emil Sapere's telephone had been authorized and installed, in the course of which Sapere had made several attempts to dial a certain telephone number. Two of the calls were completed, in which he engaged in conversations, arguably of a gambling nature,⁵ with an individual who identified himself as "Matt" or "Mike." Subsequently the FBI learned through the telephone company that the number Sapere had called was listed to Edwina Dawidowicz, appellant's common-law wife. The defense contended at the suppression hearing that "Matt" or "Mike" was known to the FBI agents as the appellant, Michael Chiarizio. The government denied having so identified

⁴/ The "if known" qualification of section 2518(1)(b)(iv) suggests that actual knowledge, not probable cause, is the intended standard. Where the government has actual knowledge of the identity of the target of the electronic surveillance but fails to identify anyone in the application and order, it has been held that such omission constitutes a procedural defect sufficient to warrant suppression. Cf. United States v. Eastman, 465 F.2d 1057, 1062 (3rd Cir. 1972); United States v. Wolk, 466 F.2d 1143, 1146 (8th Cir. 1972).

⁵/ See the district court's opinion (App. 8A, n. 12).

"Matt" or "Mike." The court below concluded (App. 8A-9A):

This denial is credible in light of the fact that these brief conversations were only two of over one thousand intercepted at the time, the speaker's identification of himself was indistinct, and the FBI did not learn that the number called was that of Ms. Dawidowicz until several days after the interception had taken place.

Even if the government's disclaimers on this point were to be discredited, it is clear that the investigators did not consider these calls to be of very great importance. They were attempting to identify those persons with whom the targets of the wiretap were carrying on significant gambling operations.

Appellant had not been named as a target of the November 1971 wiretap.^{7/} Moreover, after the interceptions had been terminated, the government applied for warrants to search the homes of individuals who were targets of the investigation or whose involvement was uncovered during the wiretap; no warrant was sought against appellant, and he was not ultimately indicted as a result of the wiretap.

^{7/} An earlier wiretap of the telephones of two suspected confederates of Sapere had been authorized, chiefly upon information supplied to the FBI by a reliable informant who purportedly was a close associate of Sapere. In the only mention of appellant's name in the 21-page affidavit, the confidential informant had advised "that numerous 'independent' bookmakers in the Hartford, Connecticut area have layoff arrangements with the SAPERES, including MICHAEL CHIARIZIO, who operates from his residence at 1891 Broad Street, Hartford. . . ."

Appellant also claims that since in May 1972 agents of the FBI attempted to secure his testimony against Sapere and others in another case, they must have been aware of a gambling relationship between himself and Sapere. Evidence adduced at the suppression hearing below indicated no basis for such an inference, however. Neither agent could recall the details of the 1972 interview other than that appellant was one of about thirty individuals whose testimony was sought, and that one of the agents told appellant that "there had been wiretaps" and that they hoped he would become a government witness, leaving it to him to draw the inference (for which there was no basis in fact) that he might face charges if he failed to cooperate (S. Tr. 102-108, 116-117, 124, 148-154). Ultimately appellant refused to testify against Sapere but was never charged in the case.

The testimony of other law enforcement agents called by the defendants likewise negated the possibility that the government was aware of a gambling relationship between Sapere and appellant. Clearly, then, the district court properly concluded (App. 10A-15A) that in March 1973, when the government made application to intercept appellant's telephone, the applicants had neither actual knowledge nor probable cause to believe that conversations with Emil Sapere would be intercepted during the requested wiretap.

2. In any event, the statutory language strongly supports an interpretation that the only person who, if known, must be named in the application, is the individual who owns or

regularly uses the facilities -- i.e., the target of the interception. By linking "the person" with the phrase "committing the offense and whose communications are to be intercepted," Congress left little doubt that the "person" referred to is the target of the investigation. By linking "the person" with the phrase "committing the offense and whose communications are to be intercepted," Congress left little doubt that the "person" referred to is the target of the investigation. ^{8/} Moreover, the choice of the singular "person" appears to have been deliberate. The New York statute from which Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§2510-2520) was derived required identification of "the person or persons whose communications. . . are to be overheard. . ." (Berger v. New York, 388 U.S. 41, 59 (1967), emphasis supplied) but Congress abandoned that formulation in favor of the use of the singular.

Moreover, the last paragraph of Section 2518(4) authorizes the government to obtain a provision in the intercept authorization directing that "a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary

^{8/} Had Congress intended to refer to all parties to the conversation, it could have done so clearly, as in 18 U.S.C. §§2518(8)(d) and 2510(11).

to accomplish the interception unobtrusively and with a minimum of interference with the services. . .[being furnished] the person whose communications are to be intercepted" (emphasis supplied). Since the communications common carrier, landlord, or custodian would not be furnishing services subject to interference to persons calling in from unmonitored phones, the "person" referred to is clearly the one who owns or customarily uses the facility to be intercepted. Since Congress presumably did not use virtually the same phrase to mean two different things within the same section, it is clear that in both places Congress was referring to the target of the investigation, rather than the universe of individuals who might be expected to communicate with the target over the
9/
intercepted facility.

9/ See also 18 U.S.C. §2518(3), requiring the issuing judge to determine (*inter alia*) that there is probable cause to believe that "an individual" is committing an offense, that communications concerning the offense will probably be obtained through the interceptions, and that there is probable cause for belief that the facilities or place to be monitored are being used in connection with the commission of the offense or are leased to, listed to, or commonly used by "such person." The purpose of this subsection is to "link up specific person, specific offense, and specific place [or facility]." S. Rep. No. 1097, 90th Cong. 2nd Sess., p. 102 (1968).

To the contrary are United States v. Bernstein, 509 F.2d 996 (4th Cir. 1975), petition for certiorari pending (S. Ct., No. 74-1486); and United States v. Donovan, 513 F.2d 337 (6th Cir. 1975), petition for certiorari pending (S. Ct., No. 75-212).^{10/} But see United States v. Iannelli, 477 F.2d 999, 1003 (3rd Cir. 1973), affirmed on other grounds, 420 U.S. 770 (1975); and United States v. Wolk, 466 F.2d 1143, 1145-1146 (8th Cir. 1972); holding that a good faith error in failing to provide notice of an interception is not grounds for suppression where no prejudice exists. See United States v. Smith, 463 F.2d 710 (10th Cir. 1972); United States v. Chun, 503 F.2d 533, 540 (9th Cir. 1975).

The court of appeals in Bernstein, supra, identified three purposes to be served by the statutory identification provisions: (i) adequate executive review of electronic surveillance applications; (ii) informed judicial control over

^{10/} In its petitions for writs of certiorari in Bernstein and Donovan the government argues that the statute requires only the "target" to be identified in an application for electronic surveillance; or, in the alternative, if the statute requires the naming of all persons whom the government has probable cause to believe will be overheard on the intercepted facility, the failure to identify any such person constitutes grounds only for suppression as to him of evidence derived from the otherwise lawful interception of his conversations.

the use of electronic surveillance; and (iii) comprehensive judicial review of such surveillance. But none of these purposes is directly or substantially promoted by requiring the identification of persons who are not the principal target of the investigation. Cf. United States v. Giordano, 416 U.S. 505, 527 (1974).

Since it is unlikely that the Attorney General or the specially designated Assistant Attorney General will be familiar with the names included in proposed wire interception applications, executive review would not be significantly enhanced. Even in the few cases where the names would be recognized, the authorizing official will be properly concerned not with the identities of those involved, but with the seriousness of the offense, the existence of probable cause, and the necessity for the use of electronic surveillance.

The congressional intent to have the issuing judge provided with any prior history of electronic surveillance of the named persons is adequately protected where the principal target of a proposed interception is named. Prior electronic surveillance of persons who might incidentally be overheard conversing with the named target would ordinarily be of no substantial interest to the judge reviewing the application.

Subsequent judicial review of wire interceptions is guaranteed fully by the identification of the targets of the interception, who must receive statutory inventory notice. 18 U.S.C. § 2518(8)(d).

Indeed, the purpose of the notice is to make sure that "all authorized interceptions must eventually becomes known at least to the subject." S. Rep. No. 1097, 90th Cong. 2nd Sess., p. 105 (1968).

Finally, the naming requirement of Section 2518(1)(b)(iv) cannot reasonably be read as designed to protect the privacy of persons whose conversations may be intercepted, since it is equally proper to intercept the illegal conversations either of persons named in the order or of persons who were not named because they were not known to be using the target phones for illegal purposes. United States v. Kahn, 415 U.S. 143, 152-153 (1974). Instead, Congress protected the right of privacy of all those using the target phones by providing that the interception of innocent conversations must be minimized (18 U.S.C. §2518(5)).

No rational policy is served by suppressing only the conversations of those concerning whom there is some pre-existing evidence of illegal use of the target phones; the privacy interests of such persons are entitled to no greater protection than those of persons who are not known to be using the target phones illegally. Indeed, such a result penalizes the government for careful preauthorization investigation.

3. Moreover, as the case is presently postured it is not clear that appellant has standing to contest the government's failure to name Sapere as an individual "known [to be] committing the offense and whose communications are to be intercepted" (18 U.S.C. §2518(1)(b)(iv)). The omission of

Sapere's name from the application was not prejudicial as to appellant, and would not have required suppression of the evidence on appellant's motion. In United States v. Doolittle, 507 F.2d 1368, 1371-1372, aff'd en banc, 518 F.2d 500 (5th Cir. 1975), the court stated:

The wiretap authorization referred to "Billy Cecil Doolittle and other as yet unknown." Anderson and Baxter contend that the Government had reasonable cause to believe that their conversations would be intercepted. . . . They contend that since they were not named, the wiretap order was illegal as to their conversations. . . . We reject this argument. The defendants neither allege nor demonstrate any prejudice to them in not being named in the authorization. . . . Most of the conversations of each defendant were with Doolittle, the person named in the order. There is no indication of bad faith or attempted subterfuge by the Government in its wiretap application. [11/] The application and affidavit delineated specifically the information expected to be gathered from the tap. We hold there was substantial compliance with the requirements of the Act, and that the failure to name other defendants does not render the evidence obtained as to them inadmissible under 18 U.S.C.A. §2518(10)(a).

See also, United States v. Kilgore, 518 F.2d 496 (5th Cir. 1975); United States v. Chun, supra.^{12/}

11/ The district court so found in the instant case (App. 15A). Suppression might be appropriate, however, where to avoid revealing a prior interception the government intentionally omitted the identity of the person who was the real target of a requested wiretap; see United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974). [Footnote not in original.]

12/ Contra: United States v. Bernstein, supra; United States v. Donovan, supra.

B. The Affidavit Sufficiently Established
the Necessity for the Intercept Order.

Suppression of the intercepted conversations was not compelled by the government's alleged failure to demonstrate necessity for the use of wire surveillance. 18 U.S.C. §2518(1)(c) provides that an application for interception of wire communications shall include

a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . .

Each order authorizing such electronic surveillance must contain a statement that the facts submitted in the application support such a finding. 18 U.S.C. §2518(3)(c). Appellant contends that "[t]he government made no showing to the Court, nor did the Court find that the March, 1973, wiretapping was essential to the investigation of the alleged criminal acts in question" (App. Br. 12).

One purpose of 18 U.S.C. §2518 is to ensure that statutory authority to conduct electronic surveillance "be used with restraint and only where the circumstances warrant" such an investigative device. United States v. Giordano, supra, 416 U.S. at 515. Thus, wiretapping was "not to be employed as the initial step in criminal investigation" (id.). On the other hand, the provisions of section 2518(1)(c) obviously were not intended to eliminate the use of wiretapping by creating

an insurmountable standard of necessity. 14/ The showing of necessity "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose crime." United States v. Kahn, supra, 415 U.S. at 153 n. 12. At the same time, "Congress. . . did not attempt to require 'specific' or 'all possible' investigative techniques before orders for wire taps could be issued. . . ." United States v. Smith, ___ F.2d ___ (9th Cir., Nos. 74-2936 and 74-2937, decided July 2, 1975). The statute "does not require the government to use a wiretap only as a last resort." United States v. Karrigan, 514 F.2d 35, 38 (9th Cir. 1975), petition for certiorari pending (S. Ct., No. 74-1629).

Here, Agent Santacroce stated in his March 22, 1973 affidavit:

23. This application for the purposes of interception of wire communications is being submitted to fully determine the extent of the gambling operation that was uncovered during the wire communications intercepted over telephone number 203-754-3507 being utilized by Joseph Telesca.

* * * *

27. My experience of other Agents has shown that even though gambling "customers" are identified they are unwilling to furnish information to law enforcement agents or to officials inquiring into gambling activities. This is even more true when the "customer" is a professional gambler

14/. See 1968 U.S. Code Cong. & Admin. News, p. 2190.

himself and is requested to give information concerning a gambling operation. Your affiant believes that normal investigative techniques will not result in sufficient evidence for indictment or conviction of the above-named principals in this gambling operation. This belief is based upon the fact that the confidential sources mentioned in the attached affidavit have stated that they will not testify in any court proceeding about the information they have given against any of the principals even though granted immunity.

If a search warrant was obtained and executed, although it would probably result in the seizure of gambling records, it would still fail to prove the necessary elements of Title 18, United States Code, Sections 1955, 1952, 1084, and 371, and also fail to reveal the complete nature and extent of this bookmaking operation and the identities of all of the persons involved. Also there are no known witnesses who could be relied upon to truthfully testify to the violations in question. Due to the secretiveness and security precaution with which the violations are carried out, the interception of these communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove the commission of these violations.

* * * *

In that affidavit Agent Santacroce detailed the basis for his belief that Jay Schaefer and Angelo De Sena were involved in gambling activities with appellant and that their conversations probably would be intercepted during the 15/ requested wire surveillance.

15/ Conversations of neither of these men were intercepted during the Telesca tap, although Telesca had tried unsuccessfully to call De Sena.

In United States v. Lanza, 341 F.Supp. 405, 419-420 (M.D. Fla. 1972), the court stated:

By its very nature, a lottery enterprise of any scale whatever involves a hierachial conspiracy. It is highly secretive. . . . Plainly normal investigative methods had ceased to be effective once the bottom layer of the hierarchy was reached. To suppose that the investigation should have been terminated once the bottom of the ladder had been found, once the persons who took individual wagers had been identified, is unrealistic. These are but the tip of the iceberg; they can always be replaced. To root out the offense, those who are ultimately responsible for its existence and organization must be found, and the affidavit amply demonstrates that this would be impossible by any means other than by using monitoring to observe the actual transaction of business between the sellers and their superiors.

Similarly, in the instant case, the wire interception was properly authorized to fully expose the nature and extent of the gambling business under investigation and to obtain evidence as to persons whose identity had not been learned
16/
during the earlier wiretap. See United States v. Carubia,

16/ Appellant's contention that the government violated 18 U.S.C. §2518(1)(e) by failing to disclose "precisely what it had gleaned from the February, 1973, interception procedures [the Telesca tap], and to state fully and completely why the additional tapping it sought in March of 1973 was necessary" is insubstantial. Agent Santacroce, in his affidavit accompanying the application for the March 1973 wiretap, detailed the circumstances surrounding and the evidence obtained from the Telesca interception. The affidavit included verbatim transcripts of several conversations between Telesca and appellant which indicated appellant was taking "lay-off" bets from Telesca and was supplying him with "sports line" information. This was the "full and complete statement of the facts" concerning the Telesca tap required by section 2518(1)(e).

377 F. Supp. 1099, 1103-1104 (E.D. N.Y. 1974); United States v. Mainello, 345 F. Supp. 863, 873 (E.D. N.Y. 1972).

Here, the government furnished a factual basis for the court, in its March 22 order authorizing the wire interception, to find that "normal investigative procedures reasonable appear to be unlikely to succeed and are too dangerous to be used." Where, as is frequently the case in a gambling operation, the primary vehicle for conducting such business is the telephone, the futility of attempting a conventional investigation is "self-evident." United States v. King, 335 F. Supp. 523, 535 (S.D. Cal. 1971), rev'd other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied sub nom. Light v. United States, 414 U.S. 846 (1973); United States v. Mainello, supra; United States v. Escandar, 319 F. Supp. 285 (S.D. Fla. 1970).
^{17/}

17/ In a recent decision, United States v. Kalustian (No. 74-3314, decided August 4, 1975), the Ninth Circuit has held that to satisfy the standard of 18 U.S.C. §2518(1)(c) the government

must (1) inform [the issuing authority] of every technique which is customarily used in police work in investigating the type of crime involved, and (2) explain why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of the particular circumstances of that case.

The decision constitutes a significant departure from the standard as to necessity which has been applied by this Court (see United States v. Bynum, 485 F.2d 490 (2nd Cir. 1973), vacated and remanded 417 U.S. 903 (1974), reinstated at 513 F.2d 533 (2nd Cir. 1975), certiorari pending (S. Ct., No. 74-1445)) and in prior decisions of the Ninth Circuit; see United States v. Smith, supra; United States v. Turner, supra F.2d (No. 73-2740, decided July 24, 1975); United States v. Karrigan, supra. We believe, therefore, that Kalustian was wrongly decided. The government intends to file a petition for rehearing en banc in that case.

II. THE DISTRICT COURT CORRECTLY REFUSED
TO DISMISS THE INDICTMENT ON GROUNDS OF
"ABATEMENT AND PARDON."

Appellant contends that the court below should have dismissed the indictment under the common law principle of abatement and pardon. The indictment in this case charged a gambling business operated in violation of Conn. Gen. Stat. §53-295, which was technically repealed (but superseded by Public Act 73-455) between the time of the gambling offenses in March through May 1973 and the time of appellant's indictment in April 1974.

While Public Act 73-455 technically repealed the provisions of §53-295, the offenses contained in the latter section continued to be proscribed under the new model gambling act. Conn. Pub. Act 73-455, §§ 1(3), 2, 3(d), 5(d). Accordingly, there was no common law "pardon" as to those not yet charged with conduct under the earlier section. Moreover, Conn. Gen. Stat. §54-194 contains the following saving provision:

The repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect.

There was no such provision in the repealing statute and thus former § 53-295 was plainly encompassed within the terms of the saving provision. In these circumstances, the district court correctly refused to dismiss the indictment.

III. THE TRIAL COURT DID NOT ERR IN REFUSING
TO EXCUSE THE PANEL OF JURORS.

Appellant contends that the trial court should have excused the entire panel of prospective jurors after one of them stated during the voir dire examination that he knew the defendant, and that "I'm not a personal friend of his but I have met him. Not in the business he's in, though" (App. 22A-
^{18/}
24A).

Initially we take issue with appellant's assumption (App. Br. 26) that the remark "strongly implied that the appellant. . .was involved in the gambling business." On the contrary, the remark was equally consistent with appellant's involvement in a lawful business enterprise. Given the potential danger of pursuing the matter further, we believe the trial court acted correctly in letting it pass by without calling additional attention to it. Further inquiry into the matter, which appellant contends was warranted, would have enhanced the risk that the jurors would have inferred that the "business" was that of gambling. Since the remark was not demonstrably prejudicial to the defendant, the court, having already conducted an extensive voir dire, was not obliged to make further inquiry into the effect upon the jurors of the

18/ This individual was not a member of the jury that tried appellant.

venireman's casual reference to appellant's "business."

United States v. Colabella, 448 F.2d 1299, 1303 (2nd Cir. 1971), cert. denied, 405 U.S. 929 (1972).

As appellant concedes (App. Br. 28), the determination not to inquire further as to the juror's perception of the remark was for the trial court in the sound exercise of its discretion. This court has so held:

There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empanelling of a jury. Indeed the entire voir dire procedure in the empanelling of a jury, by its nature, is one best left to the sound discretion of the judge.

United States v. Ploof, 464 F.2d 116, 118 n.4 (2nd Cir. 1972), cert. denied, sub nom. Godin v. United States, 409 U.S. 952 (1972). See also, Reynolds v. United States, 98 U.S. 145, 156 (1878); Spies v. Illinois, 123 U.S. 131 (1887); Holt v. United States, 218 U.S. 245 (1910); Irwin v. Dowd, 366 U.S. 717 (1961).

In the present case, the court acted within its discretion in declining to pursue the tentative, speculative possibility that the jury panel may have been influenced by the prospective juror's offhand remark. See United States v. Colabella, supra, 448 F.2d at 1302. Had the court initiated further inquiry into the effect of the prospective juror's comment, it might have run the risk that its own comments would have played a significant role in causing the jury to conclude that the "business" in question was an illegal gambling

business. This surely was the kind of situation where it was "neither feasible nor desirable to examine every prospective juror individually out of the hearing of the panel" (United States v. Colabella, supra, 448 F.2d at 1304) to determine whether the comment prejudiced the jurors' ability to judge the case impartially.

The trial court conducted a full and fair voir dire examination. Satisfied that the petit jury thereby selected was comprised of twelve unbiased individuals (United States v. Colabella, supra, 448 F.2d at 1303), the refusal to conduct further examination or to dismiss the entire panel did not constitute an abuse of discretion. United States v. Ploof, supra; United States v. Palumbo, 401 F.2d 270, 275 (2nd Cir. 1968), cert. denied, 394 U.S. 947 (1969).

IV. THE CHAIN OF CUSTODY OF VOICE EXEMPLARS,
TAPE RECORDINGS, AND RELATED MATERIALS
WAS PROPERLY ESTABLISHED.

Appellant's contention that certain tape recordings and related materials were improperly admitted into evidence because of faulty proof as to the chain of custody is insubstantial. FBI Agent McWhorter testified from his own knowledge that the tapes containing voice exemplars of appellant's voice remained in the custody and control of the FBI from the time they were made until the time he removed them from the FBI's Bulky Exhibit Room for use at trial (App. 32A-33A). The exhibit room is a locked, secured area within the

FBI's offices at New Haven (App. 33A, 40A).

FBI Agent Santacroce testified as to the procedures used in recording, copying, and preserving the tapes of telephone conversations monitored pursuant to the wiretap order.¹⁹ After the first day's recording was made, the tape was removed to the New Haven office, where it was copied and placed in the vault. Beginning with the second day, a different procedure was followed. Each evening, the tape of that day's conversations was taken from the monitoring site in Hartford to the FBI office in New Haven, where it was placed in a locked vault. The following day, the tape was removed from the vault, taken to the monitoring site, copied on different tape recorders, then returned to the locked vault (App. 39A-40A, 53A-56A).

Each day's recordings were placed in a separate manila envelope to which was stapled a "custody sheet" (App. 56A). Each such envelope containing tapes was stored in a box in a vault in the Bulky Exhibit Room to which only 15-16 persons, special agents of the FBI, had access (App. 56A-58A).

That other special agents had access to the evidence vault did not detract from the strength of the government's proof as to chain of custody. Absent "a minimal showing of

¹⁹/ The witness also testified (App. 48A) that the pen register readouts were in the same condition at trial as when made during the wire surveillance, and that there had been no alteration, editing, or change in the tapes, logs, or pen register readouts.

ill will, bad faith, other evil motivation or some physical evidence of tampering," United States v. Daughtry, 502 F.2d 1019, 1021 (5th Cir. 1974), a showing of mere opportunity to tamper does not affect the admissibility of evidence.

Access to the room by other agents affected the weight, not the admissibility, of the tapes. United States v. Fletcher, 487 F.2d 22 (5th Cir. 1973), cert. denied, 416 U.S. 958 (1974).^{20/} Especially in view of the fact that the record reveals neither an inclination to tamper nor any instance of actual tampering, the jury apparently resolved the question of the tapes' authenticity in the government's favor.^{21/} See United States v. Graham, 464 F.2d 1073 (5th Cir. 1972), cert. denied, sub nom. Jenkins v. United States, 409 U.S. 987 (1972).

20/ In United States v. Knohl, 379 F.2d 427, 440 (2nd Cir. 1967), cert. denied, 389 U.S. 973 (1967), the Court acknowledged that "the Government's procedures for insuring the safekeeping of the tape were hardly adequate" (the tape having been entrusted for more than 2 weeks to the custody of an interested party, who admitted on cross-examination that she had intentionally erased some "insignificant" portion, 379 F.2d at 439 n. 8), yet held that the trial court did not abuse its discretion by admitting the tape into evidence.

21/ There is no evidence in the record to support appellant's conclusory statement (App. Br. 34) that "[s]ound recordings are easily susceptible to alterations." An accidental or intentional erasure would hardly pass undetected unless effected by "'skillful editorial manipulation. People v. Nicoletti, 34 N.Y. 2d 249, 356 N.Y. Supp. 2d 855, 313 N.E. 2d 336, 338 (1974)."

V. THE JURY'S USE OF TRANSCRIPTS WAS NOT IMPROPER.

Appellant contends that the trial court should not have permitted the jury to examine transcripts (not in evidence) of tape recordings which were admitted into evidence. To begin with, at trial appellant waived objection to the utilization of the transcripts, as the following colloquy makes evident (App. 25A-26A):

MR. HEIMAN [for appellant]: If your Honor please, I have no feelings at all except with respect to transcripts.

I submit, if the Court please, that if the government is going to make a bootstrap operation out of offering both the transcripts and the tape, then according to Bryant. . . that in order for them to be admissible, the transcripts themselves to be admissible, one of two sets of circumstances must exist:

One, the parties must be able to stipulate as to the accuracy of the transcripts with respect to the tape. . . .

By subsequently conceding that the transcripts of conversations involving appellant Chiarizio were accurate (App. 64A), counsel necessarily conceded the propriety of the use of the transcripts.

There is no error in allowing a jury to utilize government-prepared transcripts to aid its listening to a tape recording. United States v. Carson, 464 F.2d 424 (2nd Cir. 1972), cert. denied, 409 U.S. 949 (1972); United States v. Johnson, 363 F.Supp. 711 (E.D. Pa. 1973), aff'd, 492 F.2d 1239 (3rd Cir. 1974); Fountain v. United States, 384 F.2d 624, 632 (5th Cir. 1967), cert. denied, sub nom. Marshall v. United States,

390 U.S. 1005 (1968). Deficiencies in the quality of tape recordings are matters relating to the weight, not the admissibility, of such recordings. See United States v. Miller, 316 F.2d 81 (6th Cir. 1963).

Appellant in essence complains of the court's failure to follow the procedure suggested in United States v. Bryant, 480 F.2d 785 (2nd Cir. 1973), for employment of tape recordings and transcripts thereof in the course of a criminal trial.

^{22/} The procedure outlined in that case was pointedly intended "to avoid a mistrial or reversal resulting from an inaudible and prejudicial tape being played to the jury or an inaccurate transcript being submitted to them" (480 F.2d at 789).

No such dangers lurked in this case. Counsel for appellant had had the tapes available for a year, but had not reviewed them prior to trial to ferret out any portions claimed to be inaudible, prejudicial, or inaccurate. The trial court

22/ In Bryant the court stated:

The correct procedure would have been for the judge to have had the tape played out of the presence of the jury so that he could have ruled on any objections before the jury heard the recording. . . . Such procedure would have enabled the judge to rule on all objections, including the competence of the tape, before it was played for the jury. And the transcript should have been compared against the tape before the transcript was given to jury. . . .

correctly refused to interrupt the trial to conduct the very examination counsel had failed to undertake during the previous year, but instead suggested that counsel listen to the tapes and point out to the court any portions of the transcripts claimed to be inaccurate. In obedience to the court's suggestion, defense counsel (assisted by the FBI case agent) listened to each of the conversations the government intended to offer in evidence, and agreed that the transcripts of conversations involving Chiarizio were accurate (App. 64A).^{23/} This court approved a similar procedure in United States v. Carson, supra, 464 F.2d at 436-437 (2nd Cir. 1972).

In any event, non-compliance with the procedure outlined in Bryant does not require reversal. United States v. Bryant, supra, 480 F.2d at 789. This is especially so where, as here, the alleged defects in the tapes and/or transcripts did not involve the tapes actually introduced into evidence against appellant.

^{23/} The purported existence of minute inaccuracies in transcripts admitted against other defendants, is not at issue in this appeal. In any event, appellant pointed to no specific instances of erroneous transcription, but merely complained generally of the poor quality of the tape recordings (App. 63A-65A).

VI. THE TRIAL COURT DID NOT ERR IN PERMITTING A GOVERNMENT WITNESS TO READ TO THE JURY FROM TRANSCRIPTS OF DEFENDANTS' TELEPHONE CONVERSATIONS.

Appellant contends that the trial court erred in permitting FBI Agent Santacroce to read to the jury from the transcripts of telephone conversations among the defendants. The government had sought to have the agent testify, in a summary fashion, to the substance of the conversations, but to this the defense repeatedly and strenuously objected (e.g., Tr. 437, 441-442, 454). The government's efforts to admit the transcripts themselves into evidence were countered by a defense objection and a reserved ruling (Tr. 453, 455, 458, 463, 465). Playing the tapes themselves for the jury would have been a time-consuming and distracting undertaking and would have protracted the trial, and therefore was rejected (cf. Tr. 448).

Instead, the court, mindful of time constraints on the court and the parties (see Tr. 448), adopted a common-sense approach fair to both parties, by allowing the witness to read (in the jury's presence) those portions of the transcript of conversations necessary to demonstrate the existence of an illegal gambling business. Indeed, after being importuned by the court to do so, counsel were able to reach a tentative agreement as to the procedures by which the relevant conversations might be introduced (Tr. 450-451):

MR. COFFEY: Your Honor, before the jury is called, Mr. Heiman and I, and other counsel, have attempted to work out what transcripts we think are accurate and which are not. We did reach some agreement.

THE COURT: As to accuracy or adibility?

MR. COFFEY: Well, as to both, your Honor. If Mr. Heiman feels that they are inaudible, therefore if Mr. Santacroce says they are audible, Mr. Heiman would contest their accuracy.

THE COURT: All right. But it goes to audibility.

MR. HEIMAN: It goes to audibility, yes.

THE COURT: Right.

MR. COFFEY: Now, we were able to begin this process of weeding out what the parties could agree to. However, it would affect the expert's computation of wagers, except if the Government were to agree to not attempt to introduce certain conversations in wagers so that audibility would not be contested.

There would then not be in evidence, as far as Agent Santacroce's testimony would be concerned, grounds for which the expert could then testify to gross revenue, as a result of which the Government is going to have to proffer all of the conversations of each defendant that we've indicated to defense we will attempt to proffer and take it from there.

Mr. HEIMAN: We came across this problem when Mr. Coffey and I were going through the list and we came across one that I think was a two or three page transcript and after the last five lines on Page 1 my note was that it was garbled at that point all the way through till the end.

Apparently at that point Mr. Coffey then realized the problem of the \$2000 which I, you know, understand, and I really hadn't thought of when I started trying to agree

on what we could go and what we couldn't. I thought we'd be able to do it simply because of the fact that we have notes on everything.

MR. COFFEY: So we will just proceed, your Honor.

The contention that the use of the transcripts violated the best evidence rule is insubstantial in view of the fact that the tapes from which such transcripts were made were in fact admitted into evidence. In the present case, the transcripts, having been transcribed from the original recordings, made the conversations more intelligible to the jury and foreclosed the necessity of repeatedly interrupting the tapes ^{24/} to identify the parties to the conversation. The transcripts thus "had a corroborative effect similar to that which any photograph, drawing, or mechanical model has when used by a witness to amplify his testimony. Cf. People v. Feld, 305 N.Y. 122, 133 N.E. 2d 440, 444 (1953)." United States v. Hall, 342 F.2d 849, 853 (4th Cir. 1965).

^{24/} In Fountain v. United States, supra, 384 F.2d at 632, the court concluded that "[t]he task of the District Court was to weigh the danger of [prejudice arising from over-emphasis upon the cumulative effect of the tape and the transcripts] against the inconvenience and confusion of stopping the tape between each speaker and permitting [Police] Lt. Gracy to identify the next speaker. We cannot say that he arrived at the wrong balance."

VII

VII. THERE WAS NO PREJUDICIAL ERROR IN THE JURY'S
VIEWING CERTAIN FILING CARDS ATTACHED TO THE
TRANSCRIPTS OF TELEPHONE CONVERSATIONS.

Appellant's contention that the court erred in allowing the jury to see certain filing cards attached to the transcripts of telephone conversations, is without merit. The filing cards, a sample of which is reproduced at App. 92A, contained the following information with reference to each telephone conversation:

Date of conversation (*)
Time of conversation (*)
Intercepted wire facility
USDCT [court order] no.
Exhibit number of recording (*)
Digital counter setting
Parties

The information which we have marked with an asterisk (*) merely duplicated and repeated information contained on the face of the transcript, and therefore was not prejudicial. The "USDCT" number and digital counter setting were mere reference numbers which could not have been prejudicial. The "intercepted wire facility" or telephone number being intercepted, and the names of the parties to the conversation, were in all instances first testified to Agent Santacroce before he was asked to read from the transcripts.

25 /

25 / For example, the sample transcript (App. 93A) and index card (App. 92A) were used by Agent Santacroce to refresh his recollection as to a conversation which he testified was monitored on telephone number 247-5976 on March 24, 1973, at 1:33 PM, between defendants Sheridan and Chiarizio (Tr. 455-457).

The index cards merely enabled the jury to identify which party was which. Thus the trial judge correctly treated the index cards as mere bookkeeping references to aid the jury in following the transcript (App. 69A-71A), and did not abuse his discretion in permitting their utilization by the jury.

Appellant's suggestion (App. Br. 49) that the index cards constituted out of court statements being used to prove the truth of the matters therein, and therefore were inadmissible hearsay, is insubstantial. The agent's testimony from his own knowledge, subject to the rigors of cross-examination, was used to prove the truth of the subject matter of the various conversations, including the time thereof and the parties thereto. Cf. Dutton v. Evans, 400 U.S. 74 (1970). The index cards were mere written memorials of the agent's testimony concerning these matters, and had no independent probative value. The court pointedly instructed the jury that the index card is not evidence that these are the persons who were participating in that conversation. This is to identify what is offered as evidence of a conversation between two such named persons.

It is not evidence itself. It's just so you can find where it is. [Tr. 558-559.]

VIII. AGENT SANTACROCE WAS PROPERLY PERMITTED TO IDENTIFY APPELLANT'S VOICE ON THE BASIS OF RECORDED VOICE EXEMPLARS.

The trial court properly allowed FEI Agent Santacroce to identify appellant's voice on tape recordings of telephone conversations intercepted pursuant to the wiretap orders.

Santacroce testified (App. 49A-52A) that he had listened to a

voice exemplar of appellant Michael Chiarizio, and that appellant's voice corresponded with that of the person identified as "Mickey" on over 400 tapes. On cross-examination Santacroce admitted he had not been specially trained in speech patterns or what counsel termed "electronic distortion of voices" (App. 86A-88A).

Circumstantial evidence may be used to prove the identity of parties to a telephone conversation. Palos v. United States, 416 F.2d 438 (5th Cir. 1969), cert. denied, 397 U.S. 980 (1969); Spindler v. United States, 336 F.2d 678 (9th Cir. 1964), cert. denied, sub nom. Fichards v. United States, 380 U.S. 909 (1965). So long as a basis exists for the witness to make a reasonably accurate identification of the speaker's voice, United States v. Turner, 485 F.2d 976 (D.C. Cir. 1973), it is not necessary that the witness had ever spoken to face with the person whose voice he has identified; see, e.g., Davis v. United States, 279 F.2d 576 (4th Cir. 1960); Palos v. United States, supra. The test is whether the witness "has heard the voice of the alleged speaker at any time." United States v. Rizzo, 492 F.2d 443, 448 (2nd Cir. 1974), cert. denied, 417 U.S. 944 (1974).

Acquiring familiarity with a person's voice through use of a satisfactory quality voice exemplar, as was the case here, is in our view at least as substantial a basis for identifying one's voice as an actual face to face encounter of short duration, as in United States v. Borrone-Iclar, 468 F.2d 419 (2nd Cir. 1972), cert. denied, sub nom. Gernio v.

United States, 410 U.S. 927 (1973), or in Espinoza v. United States, 317 F. 2d 275 (9th Cir. 1963). Moreover, it does not matter that Santacroce admitted (App. 89A-91A) that he had expected to hear certain persons on the tapes, since a reasonable expectation that certain persons were using the telephone to conduct an illegal gambling business was an essential prerequisite to obtaining the wiretap order in the first instance, and since the intercepted wire communication was physically located upon premises which adjoined appellant's residence and was listed to a relative.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief
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